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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 124

THE CREEK NATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Indian Claims Commission (Pet. App. 64–74) is reported at 7 Ind. Cl. Comm. 117, 127. The opinion of the Court of Claims (Pet. App. 28–53) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 1, 1961 (Pet. App. 28). The petition for a writ of certiorari was filed on May 29, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1) and Section 20(e) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s(e).

TREATIES AND STATUTES INVOLVED

The pertinent portions of the five treaties between the Creek Nation and the United States upon which this suit is based are set forth in Petitioner's Appendix at pp. 23–27. The pertinent provisions of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70–70v, are set forth at pages 3 to 5 of the petition.[1]

QUESTION PRESENTED

Whether, in a suit by an Indian Tribe against the United States based on the government's alleged breach of its treaty obligations to make certain payments to the Tribe, the burden of proof is upon the government to show that it made the payments, rather than upon the Tribe to show that they had not been made.

STATEMENT

The petitioner, the Creek Nation, brought this action before the Indian Claims Commission to recover amounts allegedly due under five treaties between it and the United States executed between 1802 and 1856. Under the treaties, the government was obligated to make payments and to provide goods and services to petitioner.

To support its claim, petitioner relied principally upon a report which had been prepared by the Gen-

[1] Subsection (5) of Section 2 of the Act is shown as subsection (4) in the petition, and subsection (4) has been omitted. Subsection (4) gives the Commission jurisdiction over "claims arising from the taking by the United States whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant."

eral Accounting Office for use in a prior suit brought by petitioner against the United States. This report listed all obligations assumed by the United States under all its treaties with the Creek Nation, and all payments made on such obligations. The General Accounting Office was unable, however, to attribute certain payments to specific treaties, and was also unable to state, in certain instances, that the amounts reported were all of the sums actually disbursed by the government in fulfillment of its treaty obligations.

The petitioner contended that under the five treaties involved in this case, the government had agreed to make payments and to provide goods and services to the Creek Nation aggregating approximately $739,000; but that the total payments actually credited in the General Accounting Office report to the particular treaties were only $576,000. The petitioner urged that it was entitled to the difference of $163,000. The government, on the other hand, contended that certain of the other payments, aggregating $160,000, although not specifically allocated to the five treaties, were in fact made in satisfaction of its obligations thereunder. It also introduced evidence that one alleged treaty deficit of $29,000 had in fact been paid. Fdgs. 4–8, Pet. 55–62.

The Indian Claims Commission found that "[t]here is not sufficient evidence in the record to show that any of the indebtedness claimed by the plaintiff has not been discharged" (Fdg. 10, Pet. 63), and dismissed the case. The Commission stated (Pet. 68–69):

> Both parties make many and varying contentions as to the items of charge and credit in-

> volved, but we think the disposition of the case, without going into many of the contentions and controversies as to items, is determined by *where the burden of proof lies*—that is whether the burden is on the part of the plaintiff to prove a failure to discharge the obligations undertaken by the defendant, or whether the burden is on the defendant to prove that it discharged these obligations and is liable to the plaintiff upon its failure to do so. This question is determinable by whether the defendant stands in relation to the plaintiff as a guardian or as trustee of funds belonging to the plaintiff, or whether the relationship is that of debtor and creditor. [Emphasis by Commission.]

The Commission rejected the petitioner's contention that the treaty claims it was asserting in this case arose out of a relationship of guardian and ward, and it found that such relationship "has not been established by competent or relevant evidence" (Fdg. 3, Pet. 54). It stated (Pet. 71) that this case "only involves the relationship of ordinary debtor and creditor"; that under such a relationship one who alleges non-payment has the burden of proving it; and that the petitioner "has not proven the alleged failures of the defendant to fulfill its obligations as it is its duty to do before any recovery can be had" (Pet. 74).

In a *per curiam* opinion the Court of Claims, "being in agreement with the disposition of the case made by the Indian Claims Commission," affirmed the judgment of dismissal (Pet. 28). Judges Littleton and Madden, dissenting, were of the view that "the relationship between the United States and an Indian Tribe is sufficiently similar to the relationship be-

tween a guardian and its ward to impose upon the United States the burden of clearly accounting for its fulfillment of its Indian treaties" (Pet. 33), and that the government had failed to sustain that burden.

ARGUMENT

Both the Indian Claims Commission and the Court of Claims held that where, in proceedings under the Indian Claims Commission Act, an Indian Tribe alleges that the United States has failed to pay in full its treaty obligations to the Tribe, the burden of proof is upon the Tribe to establish that claim, and not upon the United States to negative it, *i.e.*, to show affirmatively that it did make full payment. They both further held that in this case the Tribe had failed to prove that it had not been paid in full. These rulings are in accord with settled principles governing the determination of claims by Indian Tribes against the United States and are correct. There is no occasion for review by this Court.

1. "The Federal-Indian relationship has many times been said to resemble that of guardian and ward. However, in the absence of some specific language to that effect in the treaty, the legal obligations of a true guardianship do not prevail." *Skokomish Indian Tribe* v. *France,* 269 F. 2d 555, 560 (C.A. 9). The Court of Claims has similarly held that "[w]hether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends * * * upon the express provisions of the particular treaty * * * under which the claim presented arises." *Gila River*

Pima-Maricopa Indian Community v. *United States*, 140 F. Supp. 776, 780.

None of the five treaties involved in the instant case specifically made the petitioner tribe a ward of the government.[1] The court below has held that in such circumstances the burden of proof is on the Tribe to show non-payment (*The Chickasaw Nation of Indians* v. *United States*, 103 C. Cls. 1, 35, certiorari denied on this issue, but granted and judgment reversed on another issue, 326 U.S. 217, 219). In the instant case, the Indian Claims Commission and the Court of Claims applied that settled principle. The decision in *Sioux Tribe* v. *United States*, 105 C. Cls. 725, relied on by petitioner (Pet. 20) and by the dissenting judges below (Pet. 40–42), is not to the contrary. For, as the Indian Claims Commission pointed out (Pet. 73) the "claim in the Sioux case was based on the handling of funds received by the United States as the proceeds of the sale by it of lands belonging to the Sioux Tribe whereby said funds became trust funds and the principle of law applying to the handling of same by trustee or guardian applied." In the instant case, however, the claim was based on the alleged failure of the government to carry out its treaty obligations to make

[1] The petitioner includes (Pet. 23), as one of the treaties involved in this case, the Treaty of August 7, 1790, which, it alleges, created a guardian-ward relationship. While we dispute this contention, the short answer is that none of the claims asserted in this case arose under that treaty.

certain payments to the petitioner, and the Commission held that "no one of said claims * * * is shown to involve trust funds" (Pet. 65).

2. But, even if, contrary to the rulings below, the relationship between the petitioner and the United States under the five treaties involved were deemed to be that of ward and guardian, that of itself would not shift the burden to the United States to come forward and show payment. While the existence of such a relationship would create many fiduciary obligations on the part of the government toward its wards, it does not follow that, in the determination of claims of this character by the Indian Claims Commission, Congress intended to shift the usual burden of proof from the plaintiff to the defendant. The Indian Claims Commission Act is a special jurisdictional statute. If Congress, in providing these unusual remedies for the Indian Tribes, had also intended to make the government come forward with evidence of payment whenever noncompliance with treaty obligations was asserted, it presumably would have said so. In the absence of any such indication, it is fair to conclude that, although Congress conferred upon the Indian Tribes many benefits not available to other litigants, it still intended them to follow the normal requirement that, in order to recover, they must affirmatively prove all of the allegations necessary to establish their claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
HUGH NUGENT,
Attorneys.

JUNE 1961.